

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7518 ORIGINAL

~~75-7679~~

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

TELEDYNE INDUSTRIES, INC.,
Plaintiff-Appellee,
against

ODIF PODELL, SIMON SRYBNIK, NICHOLAS
ANTON, SAUL WALLER,
Defendants-Appellants,
and

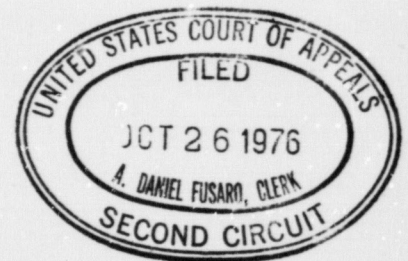
EON CORPORATION and KERNS
MANUFACTURING CORP.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
(Appeal from Order Denying Motion for a New Trial)

TRUBIN SILLCOCKS EDELMAN & KNAPP
Attorneys for Defendants-Appellants
375 Park Avenue
New York, N. Y. 10022

BREED, ABBOTT & MORGAN
Attorneys for Plaintiff-Appellee
One Chase Manhattan Plaza
New York, N. Y. 10005



PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

JUDGE KNAUTH ~~JUDGE BAUMANN~~
~~JUDGE BAUMANN~~

82 CH. 3261

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
<p>LEDYNE INDUSTRIES, INC.</p> <p>AGAINST</p> <p>FOR CORPORATION, ODIE PODEL, SIMON SRYBNIK, NICHOLAS ANTON, SAUL WALLER, AND KERNS MANUFACTURING CORPORATION.</p> <p><i>July 8/8/73</i></p>	<p>For plaintiff:</p> <p>BREED, ABBOTT & MORGAN 1 CHASE MANHATTAN PLAZA, N.Y.C. N.Y. 10005</p> <p><i>July 8/8/73</i></p> <p>For defendant: Adler & Stone 230 Park Avenue NYC 10017 689 3737 (Kerns Mfg.) Feldshuh & Frank Inc. Corp., Odif Podel Simon Srybnik, Nicholas Anton, Saul Waller 144 East 44th Street, NYC 10017 MU 7-8930 Feldshuh & Frank 144 East 44th St, NYC 10017 MU 7-8930 for Eon Corp. (substituted 4-2-73)</p>

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed <input checked="" type="checkbox"/>	Clerk	<i>7/11/73</i>	<i>Grand E.</i>	<i>11-</i>	
S. 6 mailed <input checked="" type="checkbox"/>	Marshal	<i>7/11/73</i>	<i>US Br</i>		<i>15 -</i>
asis of Action:	Docket fee				
RAUD, CONSPIRACY	Witness fees				
\$2,000,000	Depositions				
ction arose at:					

A 2
Docket Entries

72 CIV. 326

DATE	PROCEEDINGS	Date Ord. Judgment
Jul 31-72	FILED COMPLAINT. ISSUED SUMMONS.	
Jul 31-72	Filed Affidavit & order by Charles M. Mitchell requesting that Donald L. Price and Thomas p. McCloy be permitted to serve process in the above action. So ordered. Livingston, Clerk.	
Aug 9 72	Filed plttf's request for production addressed to Eon Corp.	
Aug 18.72	Filed Summons and xxxxxx proof of service.	
Aug 23.72	Filed Dft. Kerns Mfg. Corp., Notice to take deposition.	
Aug. 23.72	Filed Dft. Kerns Mfg. Corp., Notice to Admit.	
Aug. 23.72	Filed Dft. Kerns Mfg. ANSWER.	W&S
Aug 28.72	Filed ANSWER of Dfts. Odif Podell, Simon Srybnik, Nicholas Anton, Saul Waller.	F&F F&F
Aug 28.72	Filed ANSWER of Dft. Eon Corp.	
Sep 11.72	Filed Pltff's request for production addressed to Kerns Mfg. Corp.	
Sep 11.72	Filed Pltff's request for production addressed to Odif Podell.	
Sep 11.72	Filed Pltff's request for production addressed to Simon Srybnik.	
Sep 11.72	Filed Pltff's request for production addressed to Nicholas Anton.	
Sep 11.72	Filed Pltff's request for production addressed to Saul Waller.	
Sep 11.72	Filed Pltff's request for production addressed to Eon Corp.	
Oct 7.72	Filed Pltffs. Reply to counterclaim of dft. Eon Corp.	
Oct 10.72	Filed Response to plttf's request for production on behalf of dfts. Simon Srybnik, xxxx Nicholas Anton, Saul Waller & Odif Podell.	
Oct 10.72	Filed response to plttf's request for production addressed to Eon Corp.	
Oct 11.72	Filed Pltff. Notice of taking deposition upon Eon Corp.	
Nov. 3-72	Filed stipulation and order extending plaintiff's time to answer or object to interrogatories to 12/1/72. So ordered. Lasker, J.	
Dec. 1-72	Filed notice to take Deposition upon oral Examination of H. J. Leonard.	
Dec. 1-72	Filed Notice to take Deposition of Robert Walck.	
Dec. 27-72	Filed Pltff Notice to take deposition upon oral examination.	
Dec. 27-72	Filed Pltff Notice to take deposition upon oral examination.	
Dec. 27-72	Filed Pltff Notice to take deposition upon oral examination.	
Jan. 10-73	Filed Pltffs Notice to take deposition upon oral examination.	
Jan. 10-73	Filed Pltffs Notice to take deposition upon oral examination.	
Feb. 13-73	Filed Notice of Motion Rel. 2/16/73 at 9:30 AM in ROOM 705 re: compel inspection.	
Feb. 13-73	Filed Memorandum of law in support of motion.	
Feb. 21-73	Filed stipulation and order adjourning plaintiff's motion now ret. 2/16/73 to 3/16/73. So ordered. Bauman, J.	
Mar. 7, 73	Filed deposition of Robert Walck, taken on behalf of plttf.	
Mar. 7, 73	Filed deposition of Eugene R. Walper, taken on behalf of plttf.	
Mar. 13, 73	Filed stip. and order plttf. motion ret. 3/16/73 adjourned until Mar. 30, 73. BAUMAN, J.	
Mar. 19, 73	Filed notice of cross-motion on behalf of defts Podell, Srybnik, Anton and Waller. ret. March 30, 73 at 9:30a.m. Room 705Re; Summary Judgment.	
Mar. 19, 73	Filed memo. on law in support.	
Mar 22-73	Filed stip. and order extending	
Mar 30-73	Filed stip. and order that plttfs motion is adjourned to 5/4/73, So Ordered Bauman J.	
Apr 2-73	Filed Consent to Change atty for deft Eon Corp. BAUMAN, J. (mn)	
Apr 23-73	Filed Pltff's memo in opposition to cross-motion for partial summary judgment	
Apr 26-73	Filed Pltff's counter-statement under rule 9(g).	
May 4-73	Filed stip and order that the plttf's motion and the individual defts' cross-motions are hereby adjourned to 5/18/73, So Ordered Bauman J.	
Sep. 26-73	Filed deft. Kerns Manufacturing notice of motion for admission, to strike complaint, etc. Ret. Oct. 5-73. & Motion to dismiss.	
Sep. 26-73	Filed deft. Kerns memo of law in support of motion to dismiss.	

72 Civ.3261

TELEDYNE INDUSTRIES, INC. -v- EON CORP., et al

D. C. 110A Rev. Civil Docket Continuation

Page 2

DATE	PROCEEDINGS
Sep. 28-73	Filed Stip and Order adjourning deft. Kerns Manufacturing motion until Oct. 19-73. BAUMAN, J.
Oct. 24-73	Filed memo endorsed on motion by deft. Kerns filed 9-26-73-Motion withdrawn- So ordered-Bauman, J.
Oct. 19-73	Filed stip. & order of discontinuance as to deft. Kerns Manufacturing Corp. with prejudice--Bauman, J.
Mar. 20-74	Filed deposition of Harold W. Rouse
Mar. 20-74	Filed deposition of Homer Coleman
Mar. 20-74	Filed deposition of Teledyne Indust. by W. A. Anderson
Mar. 20-74	Filed deposition of Nicholas Anton.
3-20-74	Filed continued deposition of Nicholas Anton
3-20-74	Filed deposition of Simon Srybnik
3-20-74	Filed deposition of Odif Podell
Mar. 20-74	Filed deposition of Saul Waller
Mar. 20-74	Filed reply memorandum of law on behalf of individual defts. Odif Podell, et al
Mar. 20-74	Filed OPINION #40,482---Defts' motion for summary judgment dismissing the action is denied. Pltff's motion to compel the inspection of documents is granted except as to the materials sought in paragraph (6) of its original request. It is so ordered--Bauman, J.-mailed notice.
Jun. 27-74	Action reassigned to Knapp, J.
SEPT. 17-74	Filed transcript of record of proceedings, dated 7/15-16-17-18/74
Nov. 7-74	Filed deposition of Nicholas Anton, held on 11-21-72. m/n
Jul. 15-74	Before Knapp, J. NON-JURY TRIAL BEGUN.
Jul. 16-74	Trial continued.
Jul. 17-74	" "
Jul. 18-74	" "
Jan. 13-75	" "
Jan. 14-75	" "
Jan. 15-75	" "
Jan. 16-75	" "
Jan. 17-75	" "
1-20-75	" "
Jan. 21-75	" "
Jan. 22-75	" & concluded. Decision reserved.
Mar. 11-75	Filed pltff's post-trial brief.
Mar. 17-75	Filed Transcript of record of proceedings dated Jan. 13, 14, 15, 16, 1975
Mar. 17-75	Filed " " " " " " 17, 20, 21, 22, 1975.
04-21-75	Filed defts.' post-trial memo. of law.
-07-75	Filed Pltff's post-trial reply brief.
-09-75	Filed Opinion #42075: Ordered that judgment be entered in behalf of the defts. against each of the defts in the sum of \$277,440.00 with interest as indicated. Judgment is to be submitted within five days of the filing of this opinion. The foregoing constitutes the court's findings of fact & conclusions of law as required by Rule 52(c) of F.R.C.P. So ordered. Knapp J. m/n
	Filed OPINION # 42051- defts. motion to reargue...denied. Knapp, J.m/n

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Docket Entries

92 Civ. 3261
TELEDYNE INDUSTRIES, INC. VS. EON CORPORATION ET AL

DATE	PROCEEDINGS NO. 3	Date of Judgm.
08-08-75	Filed JUDGMENT#75.670. Pltff recover of debts .Podell, Srybnik, Antons Waller. sum of \$297,448.90, etc. Knapp, J. JUDGMENT ENT. Clk. Ent. 8/11/ (mn)	
08-14-75	Filed Defts. Order to Show Cause with Temporary Restraining Order to execute upon or enforce judgment of Court ret. Rm. 506, 8/21/75, 9:30 A.M. Stewart, Jr.	
08-14-75	Filed Defts' Post-Judgment Memorandum of Law in support of Order to Show Cause.	
08-18-75	Filed Affidvt of Kenneth Alleyne of personal service of Order to Show Cause with Temporary Stay&Support Affidvt&Deft's Post Judgment. Memorandum of Law upon upon Breed, Abbott&Morgan, Esqs. on 8/14/75, 4:30 P.M.	
08-20-75	Filed Pltff's affidvt&Notice of motion re order altering or amending judgment to increase amt of damages awarded plttf. ret. 9/19/75, 2:00 p.m.	
08-20-75	Filed Pltff's Memorandum of law in support of motion to increase amt of damages awarded plttf.	
08-21-75	Filed Memo-endorsed on deft's show cause order filed 8-14-75 Re: Judgment: Adjourned to Sept. 2-1975, at 4:P.M. Owen, J.	
08-21-75	Filed affidavit of C. MacNeil Mitchell in opposition to deft's motion for temporary stay.	
08-21-75	Filed plttf's post-judgment memorandum in opposition to motion for temporary stay.	
09-02-75	Filed stip & order that plttf. is stayed, pending the determination of deft's appeal to the USCA, from enforcing or attempting to enforce said judgment by execution or otherwise. Owen, J.	
09-04-75	Filed deft's notice of appeal to the USCA from final judgment ent. on 8-8-75. Mailed copies to Breed, Abbott & Morgan.	
09-04-75	Filed deft's notice of appeal to the USCA from final judgment entered. on 8-8-75. Mailed notice to Breed, Abbott & Morgan.	
9-18-75	Filed Stip. & Order re: certain supplemental findings of fact. Knapp, J.	
9-22-75	Filed affidavit of R. Weinberger in opposition to plttf's motion Re: damages.	
9-22-75	Filed deft's memorandum of law in support of motion for a new trial.	
10-22-75	Filed deft's affidavits & notice of motion to vacate judg. ret. 10-31-75.	
10-24-75	Filed stip & order that motion ret. 9-26-75 adj. sine die, made ret. on 10-31-75. Knapp, J.	
10-31-75	Filed affidavit of H.W. Rouse in opposition to motion for a new trial.	
10-31-75	Filed plttf's memorandum of law in opposition to deft's motion for a new trial.	
11-05-75	Filed additional affidavit of R.R. Macdonnell in support of defts motion for a new trial.	
11-03-75	Filed Memorandum & Order 8 43327: All motions before me are denied, & any outstanding stay is vacated. So ordered. Knapp, J. m/n	
11-21-75	Filed Defts Affidvt&Notice of motion vacating judgment previously en- tered ret. 12/5/75.	
11-21-75	Filed Defts' Memorandum in support for a new trial.	
12-04-75	Filed deft's reply memorandum.	
12-04-75	Filed plttf's memorandum of law in opposition to deft's motion for a new trial.	

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Docket Entries

Civ 3261 Teledyne Industries, Inc. vs. Eon Corp. et al.

DATE	Page #4	PROCEEDINGS
12-03-75	Filed deft's O.Podell, S.Srybnik, N.Anton & S.Waller notice of appeal from order denying deft's a new trial. Mailed notice to Breed, Abbott & Morgan.	

ONLY COPY AVAILABLE

NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

TELEDYNE INDUSTRIES, INC., :

Plaintiff, :

-against- :

72 Civ. 3261
(WK)

EON CORPORATION, et al., :

Defendants. :

NOTICE OF MOTION

-----X

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavits of ROBERT R. MacDONNELL, SAUL WALLER and SIDNEY FELDSHUH, sworn to the 20th day of October, upon the exhibits annexed thereto and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Term for Motions thereof, at the Courthouse, located at Foley Square, Borough of Manhattan, City and State of New York, on the 31st day of October, 1975 at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel may be heard, for an order pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure vacating a judgment heretofore entered herein in favor of the plaintiff and against the individual defendants and ordering a new trial upon the ground that newly discovered evidence and the interests of

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Notice of Motion

justice require a new trial on the merits and for such other and further relief as this Court may deem just and proper.

Dated: October 20, 1975
New York, New York

Yours, etc.,

TRUBIN SILLCOCKS EDELMAN & KNAPP

By _____
An Associate Of The Firm
Attorneys for the Individual
Defendants
375 Park Avenue
New York, New York 10022

TO:

BREED ABBOTT & MORGAN, ESQS.
Attorneys For Plaintiff
One Chase Manhattan Plaza
New York, New York 10005

ENTERED
10-21-75

AFFIDAVIT OF ROBERT R. MacDONNELL IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

```

-----X
TELEDYNE INDUSTRIES, INC.,           :
                                     :
                Plaintiff,           :       72 Civ. 3261
                                     :
                -against-           :
                                     :
EON CORPORATION, et al.,             :   AFFIDAVIT IN SUPPORT OF
                                     :   MOTION FOR A NEW TRIAL
                Defendants.         :
-----X

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STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ROBERT R. MacDONNELL, being duly sworn, deposes and
says:

I am associated with the firm of TRUBIN SILLCOCKS
EDELMAN & KNAPP, newly substituted counsel for the individual
defendants in the above-captioned action, and I am fully familiar
with the facts and circumstances involved herein. I submit this
affidavit in support of a motion, pursuant to Rule 60(b)(2) of
the Federal Rules of Civil Procedure, to vacate a judgment here-
tofore entered in favor of the plaintiff and against the in-
dividual defendants and ordering a new trial on the ground that
newly discovered evidence and the interests of justice require
a new trial on the merits. The newly discovered evidence consists
of two affidavits which establish that the trial court's decision
was based upon perjured testimony and a contract inundated with
commercial bribery.

FACTS

This diversity action was tried without a jury over a twelve-day period in part during July, 1974 and in part during January, 1975. The plaintiff sought to impose liability on four individual defendants who were all directors and/or officers of defendant, Eon Corporation (hereinafter "Eon"). The reason behind the attempt to impose personal liability on these defendants was that Eon Corporation was bankrupt.

On June 20, 1969 Eon, through its American Marc Division (hereinafter "American Marc") was awarded a contract by the United States Army for the production and delivery of 1.5KW generator sets. In 1971 after American Marc had become unprofitable because of the completion of other contract work, it sought to subcontract the Army work remaining under the contract.

To this end, M. James Leonard (hereinafter "Leonard"), the head of American Marc and a Vice President of Eon, communicated with Eugene Wolper (hereinafter "Wolper"), a business broker, who arranged for Leonard to meet with Harold Rouse (hereinafter "Rouse") and Homer Coleman (hereinafter "Coleman"), officers of plaintiff, to discuss a possible award of the subcontract. Wolper had contacted Rouse because it was common knowledge that plaintiff had submitted an unsuccessful bid to the Army in March, 1971 to manufacture the same type of generator set manufactured by American Marc.

Between May 10 and May 12, 1971, Leonard, Coleman and Rouse, the latter two with direct communication to their corporate

attorneys, engaged in the extensive negotiations which culminated in the signing of two agreements on May 12th. The first was Purchase Order No. M-1257, the subcontract, wherein plaintiff agreed to manufacture 4,372 generator sets for Eon at a unit price of \$360. The second was an inventory agreement which provided that plaintiff would purchase from Eon all of the generator set parts and material in Eon's possession as of August 31, 1971. In addition, plaintiff purchased tooling, gauges and other equipment needed to perform the subcontract from Eon.

As found by the court after trial, the contractual agreement between the parties (although not expressed in the two writings) also related to the manner in which plaintiff would be paid by Eon. The court found that Eon, through Leonard, had agreed to deposit advances it received from the government into a "special account" and thereafter pay plaintiff's invoices out of the proceeds so deposited. The balance of the funds in the account could be disposed of as seen fit by Eon.

In the spring of 1972, Eon ceased making payments under the subcontract and withdraw funds from the special account to pay other corporate obligations. Thereafter, Eon filed for a voluntary arrangement under Chapter XI of the Bankruptcy Laws of the United States.

At the trial, plaintiff sought to prove two separate theories of liability. The first was premised upon alleged fraudulent representations having been made by Leonard, on behalf of Eon, relating to the amounts remaining to be paid to Eon from

the government under Eon's contract and as to Eon's clear and unencumbered title to the inventory. This claim for relief, after a review of all the testimony and proof, was dismissed by the trial court.

Plaintiff contended further, and the trial court held, that in creating the "special account", the parties intended that plaintiff would have an enforceable equitable title to the advances received by Eon from the government. When the trial court found that the individual defendants had, at least impliedly, consented to the withdrawal of funds in the "special account" prior to the payment of plaintiff's invoices, it held that the defendants had converted plaintiff's funds. It is with respect to this latter holding of the trial court that the individual defendants submit new evidence and respectfully urge that because of this new evidence, the original judgment should be vacated and a new trial ordered.

THE NEW EVIDENCE

Evidence submitted on a Rule 60(b)(2) motion must not be cumulative, must not have been discoverable with due diligence prior to the time of trial and must be such evidence as would change the outcome of the trial. It is submitted that the defendants' new evidence fulfills these requirements.

Defendants submit the affidavit of Eugene Wolper, a copy of which is annexed hereto and marked Exhibit "A", the third-party intermediary-broker, which, through fair inference, estab-

lishes that Coleman and Rouse paid off Leonard through an arrangement whereby Leonard would share in an illegal payment made by Coleman and Rouse to Wolper. Defendants also submit the affidavit of Saul Waller which indicates that plaintiff continued to pay Leonard after May 12, 1971.

The court will recall that at the trial, Coleman, Rouse and Leonard admitted that Wolper had received an illegal commission of \$5 per generator set sold by plaintiff to defendant (approximately ,000). Although plaintiff ostensibly paid the \$5 per unit, defendant actually paid because the subcontract price, agreed to by Leonard, was raised \$5 per unit to cover the payment to Wolper. However, Coleman, Rouse and Leonard (all witnesses for plaintiff) denied that Leonard had received any part of the commission. In the affidavit now submitted to the court, Wolper states:

"Leonard, Rouse and Coleman all knew everything necessary and knew it was a good deal and Jim was getting his share and I was getting mine."

Wolper goes on to state that he actually paid Leonard \$4,700. I have been advised that the actual agreement was that Leonard and Wolper were to split the commission on a 50/50 basis, but that Wolper refused to pay Leonard the balance of his share because of a conflict between the two relating to other matters.

It should be noted by the court that after we received the Wolper affidavit, our further efforts to discuss the matter with him have been ignored. It will therefore be necessary, if the court wishes to conduct a hearing, to subpoena Wolper.

- a) The evidence is not cumulative and was not discovered despite due diligence

It is obvious that Wolper's affidavit is not only not cumulative of prior evidence, but directly contradicts the prior testimony of Coleman, Rouse and Leonard. Moreover, it is equally clear that despite all efforts of counsel during pre-trial discovery, the true facts were never learned. Leonard, Rouse and Coleman all denied that Leonard had received any money from plaintiff in connection with the negotiation and execution of the agreements in question. In addition, on January 18, 1973, Wolper's deposition was taken in California pursuant to subpoena served by the attorneys for the plaintiff. At that time, Wolper was asked the following questions by plaintiff's counsel and gave the following answers:

"Q. Did you give any part of the sale commission that you received from Teledyne on the subcontract to Mr. Leonard?

A. I think that is more or less a private matter concerning what I do with my funds that come into my business.

Q. So you prefer not to answer that question.

A. Yes I prefer not to.

Q. I can't compel you to.

A. I know that."

In retrospect, it is not surprising to find that plaintiff's attorneys did not pursue and even suggested that they could not pursue this line of questioning.

Thus, it is submitted that we are dealing with newly

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Affidavit of Robert R. MacDonnell

discovered evidence (and even the possibility of a fraud on the court) in its truest, most clearly recognizable form. All prior testimony in this case denied the fundamental fact now alleged, i.e., that Rouse and Coleman, as plaintiff's representatives, participated with Leonard in perpetrating a fraud upon Eon by purchasing Leonard's cooperation to Eon's detriment.

The decision of the trial court was rendered on July 29, 1975. Thereafter, judgment was entered sometime in August, and a notice of appeal was served by our predecessor counsel in September, 1975. In mid-September, our firm was substituted as counsel for the appealing defendants. At that time, our clients provided us with a copy of Wolper's affidavit. The delay of less than one month between our receipt of Wolper's affidavit and the filing of the instant motion was necessitated by the time we expended in reviewing the 2,400 page trial transcript and analyzing the parties' post-trial memoranda and the court's decision. It was only after this work was completed that we were in a position to fully evaluate the impact of the new evidence.

The court should note in this regard that I advised plaintiff's attorneys immediately upon receipt of the Wolper affidavit that I was contemplating making a motion for a new trial and agreed to make the motion returnable on October 31st. I also advised Mr. Fensterstock, Chief Counsel to the Second Circuit Court of Appeals, and obtained permission from this Court to file the motion.

b) Impact On The Judgment

Explicit in the trial court's finding was the determination that plaintiff's witnesses were "wholly credible". It is apparent from a review of the trial court's decision and a review of the trial transcript, that the court believed the testimony of Coleman, Rouse and Leonard as it related to the creation of the "special account" and therefore, the trust relationship. Now, however, not only is the credibility of Coleman, Rouse and Leonard put directly in issue, but the entire foundation upon which the creation of the so-called "special account" was premised must crumble.

If it was actually the intent of the parties, agreed to at arm's-length negotiation, to create a special trust account, why did Coleman and Rouse have to pay Leonard to cooperate in the formulation of this agreement? It is respectfully submitted that Wolper's affidavit leads to the clear and logical conclusion that Leonard was paid in exchange for his agreeing, contrary to his own obligations to Eon, to set up the alleged trust account without the knowledge or consent of the officers and directors of Eon. Thus can be explained the silence in the two written agreements signed on May 12th as to the alleged trust method of payment.

The court will recall that neither the purchase order nor the inventory agreement made any reference to the establishment of the "special account". Rather, the fraudulent scheme was carried out by Leonard writing directly to the Bank of America,

after the May 12th agreements had been signed and without copying an other Eon officer, and directing that the Bank use a prior existing corporate account as the "special account". In this way, Leonard kept the existence of the "special account" relationship a secret, while avoiding almost inevitable rejection if he had requested the Eon board to authorize the opening of a new account.

Plaintiff's payment, believed by Leonard to be \$11,000 at the time, not only insured his cooperation in the scheme, but also protected plaintiff from after-the-fact reprisals. It might be postulated that Leonard did not come forward at the trial because plaintiff kept its bargain: Leonard was the only individual director of Eon not sued for fraud and conversion.

Leonard's cooperation was necessary not only to establish the "special account", but also to guarantee plaintiff a favorable agreement which would result in sizeable profits. Only two months prior to signing the subcontract, plaintiff's bid to produce the same generator set had been rejected by the Army. Thus, the contract was important to plaintiff in terms of possible future financial benefit and new government work. In addition, plaintiff stood to obtain a tremendous profit under the subcontract. Evidence was submitted below that plaintiff's prior bid to the government, which presumably contained profit anticipation, was \$330 per unit. The subcontract price negotiated with Leonard was \$360 per unit, \$30 additional profit per unit or a total of approximately \$129,000. In addition, by purchasing the inventory

and tooling from Eon, and taking over on a subcontract basis, plaintiff saved start-up and first product expenses totaling an additional \$120,000. When measured against an anticipated additional profit of \$250,000, it is not surprising that plaintiff resorted to a series of illegal payments and bribes to insure a favorable deal.

The impact of the new evidence is substantially strengthened when consideration is given to other evidence submitted at the trial which, possibly because of lack of connection, was apparently overlooked by the trial court. For example:

a) Defendants submitted evidence that 3-1/2 months after the alleged "special account" was established, Leonard met with a representative of plaintiff who had not been made privy to the contract negotiations to work out final details relating to delivery and payment. After the meeting, Leonard received a letter from plaintiff indicating that the terms of payment by Eon to plaintiff would be 30 days from invoicing. (Defendants' Trial Exhibit "O".) Leonard responded on October 11 (Plaintiff's Trial Exhibit "9"), that plaintiff was attempting to change the agreement and reiterated that payments would be made out of the Bank of America account after receipt of advance payments from the Army. The content of the letter is clearly contrary to the intent of

establishing a trust relationship, and also highlights the fact that the "special account" arrangement was not only a secret from Eon's Board of Directors but also from other officers of plaintiff.

b) The fact that Leonard was paid by plaintiff's representatives is highlighted by Defendants' Trial Exhibit "D", a letter dated September 10, 1971 from Rouse to Leonard. In that letter Rouse, while bidding on American Marc's second-year procurement under its government contract, stated that the bid unit price included a "* * * \$3.50 per unit award for your [Leonard's] consulting fee". This letter is clear evidence that after May 12th, plaintiff continued to solicit Leonard's cooperation in negotiating new subcontracts. It is reasonable to postulate, in view of the new evidence, that this payment reflected a continuation of the illegal relationship between plaintiff and Leonard.

In addition to Wolper's affidavit, defendants also submit the affidavit of Saul Waller, one of the defendants herein, which indicates that based upon his examination of plaintiff's books and records, he found a \$1,000 payment, made subsequent to May 12th, directly from plaintiff to a company controlled by Leonard. This payment, when considered with the Wolper affidavit, strongly suggests that Leonard was no more than plaintiff's

"puppet", manipulated at will whenever it served plaintiff's commercial needs.

c) Legal Implications

The new evidence raises legal questions not before faced by the trial court. For example, if it is established that plaintiff paid Leonard to obtain favorable terms in the contract, the contract may be rescinded by Eon. In addition, since plaintiff has perpetrated a fraud on Eon, Eon and its directors may assert the equitable clean-hands maxim as a defense. Moreover, the entire trust "special account" is void because Leonard, acting under the influence of a bribe, exceeded his authority as agent for Eon, which fact was known by plaintiff.

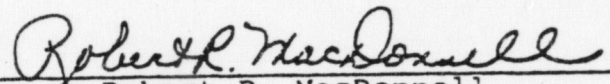
CONCLUSION

Wolper's affidavit appears to answer the one question which perplexed the court and counsel during the trial, namely, why would reasonable businessmen leave such an important (as plaintiff's witnesses testified) consideration as the "special account" to a gentlemen's agreement and not reduce it to writing as part of the documents signed on May 12th? Since plaintiff had paid Leonard, thereby assuring his cooperation, there was little risk in not reducing the arrangement to writing.

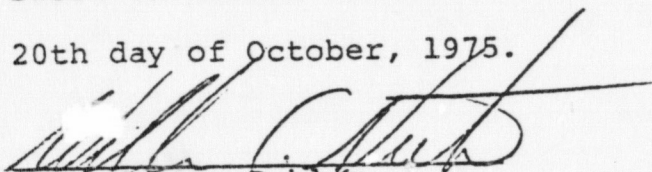
By reason of the foregoing, it is respectfully submitted that the interests of justice demand that defendants' motion should be granted in all respects and that the judgment heretofore

Affidavit of Robert R. MacDonnell

entered in favor of the plaintiff be vacated and a new trial ordered only with respect to the conversion count of the complaint. Since the new evidence does not relate to the counts already dismissed by the trial court, that portion of the judgment should remain valid.


Robert R. MacDonnell

Sworn to before me this
20th day of October, 1975.


Notary Public

WILLIAM C. VIETS
NOTARY PUBLIC, State of New York
No. 31-4524333
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT A--AFFIDAVIT OF EUGENE WOLPER ANNEXED
TO AFFIDAVIT OF ROBERT R. MacDONNELL

TO WHOM IT MAY CONCERN:

The first week in May, 1971, Jim Leonard had been contacting firms who would be interested in the buying of the 1 1/2 KW Military generator "Marc" contract and assume the production. I was working with Leonard at the time on a draw against commission on the sale of machine tools for S & S Machinery Co.

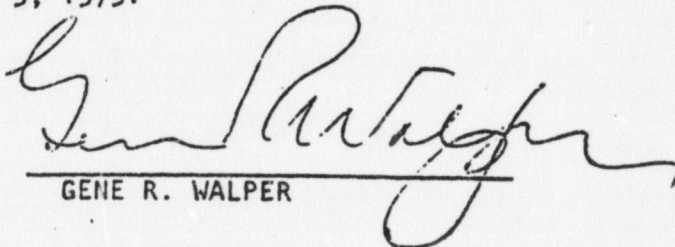
Jim knew that Teledyne had been my client for several years. Part of my usual business is and was as a finder. I first met Jim in 1958 and was commissioned by him to work with him on a liquid nitrogen project.

I arranged for Mr. Coleman and Mr. Rouse from Teledyne Continental Motors, Waltersboro, S.C. to come to American Marc. These gentlemen were extremely anxious to have this contract since I talked with them on Saturday. They flew in on Sunday and I then had breakfast with them at 8:30 on the following Monday at the International Hotel in Los Angeles and I then brought them to American Marc. I knew they needed this contract which figured to be profitable and which they told us would also result in "follow-on" additional contracts at more profitable terms, as they would own the tooling and know-how which American Marc was selling to them.

The first date, from the onset, Rouse had an inkling that Jim and I were sharing in the proceeds of the \$5. per unit of each generator. When Coleman and Leonard got into a heated discussion in negotiations and left the room, Rouse went into the other room with Jim and when they returned, the deal was pretty well made. Leonard, Rouse, and Coleman all knew everything necessary and knew it was a good deal and Jim was getting his share and I was getting mine. Eventually, Jim received approximately \$4700. from me from part of my share.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in San Diego, California on May 9, 1975.



GENE R. WALPER

COUNTY OF SAN DIEGO)

The above Statement was dictated and prepared in the presence of GENE R. WALPER, and, in my presence, Gene R. Walper specifically acknowledged that he understood the above statement, its meaning, and the facts related therein, and knew the statement was being given voluntarily and under oath, and was the whole truth; that he signed and swore to the statement knowing full well that he was called upon to swear to the truth of the facts therein and given voluntarily.

OFFICIAL SEAL
HERBERT B. RICHMOND
NOTARY PUBLIC-CALIFORNIA
SANTA BARBARA COUNTY
My Commission Expires Apr. 17, 1976
S. B. 92037

Herbert B. Richmond
HERBERT B. RICHMOND

TRIAL EXHIBIT O--LETTER DATED OCTOBER 9, 1971 ANNEXED
TO AFFIDAVIT OF ROBERT R. MacDONNELL

CONTINENTAL MOTORS

ROUTE NO 3
BOX 40
WALTERBORO, SOUTH CAROLINA 29488
(803) 535-2121 CABLE: CONTENT

October 9, 1971

American Marc Division
Eon Corporation
8831 South Aviation Boulevard
Inglewood, California 90301

Attn: Mr. M. J. Leonard

Gentlemen:

Subject: Your Purchase Order Number M-1257
For 4351 Each 1.5 KW Generator Sets

As a result of our meeting in New York City on September 1, 1971, verbal agreement was reached on the majority of points set forth in M. Saunders letter dated July 8, 1971. As you will recall, that letter contained all of the items which we requested be added to the original Purchase Order number 1257. Such supplementation was, in our opinion, necessary to effect a complete legal understanding and agreement between American Marc and TCM. Subsequently, eight revisions to the Purchase Order were issued in lieu of incorporating the agreement attached to M. Saunders' letter. Unfortunately, in this transition to purchase order revisions several previously agreed upon points were either overlooked or re-evaluated by American Marc and considered unnecessary. Our top management has given this matter their full attention and it is the consensus that the following items must be incorporated into the purchase order to effect a complete and equitable agreement between American Marc and TCM:

1. In modifying the terms and conditions shown on the reverse side of your purchase order, five deletions are required, i.e.
 - (g) Termination including sub-paragraphs (1), (2), (3) and (4).
 - (j) Sub-contracting
 - (k) Domestic Articles
 - (m) Notice to Government of Labor Disputes
 - (o) Limitation of Profit
2. In reference to M. Saunders' letter, Article IV, Pg. 5 - "Option For Increased Quantity" must be incorporated including paragraphs:
 - A - Option Amount, B - Time Period, C - Right to Exercise Option In Increments, D - Option Guarantee and E - Definitions

*American Marc
will take
over*

*OK
American
more
will accept*

208 - See L.L.C.

CONTINENTAL MOTORS

*American Marc
will not
accept*

Also on page 5 of the referenced letter Article V relative to Specifications must be incorporated including the accompanying detail on Exhibit "D".

*A.M. will
accept
by letter*

4. Page 7 of the referenced letter Article VII, Buyer Furnished Property, must be incorporated along with related Exhibit "D".

5. Page 7 of the referenced letter Article VIII, Preparation and Distribution of DD Form 250 (MIRR) and Article IX, Instructions For Application, Deprocessing, Maintenance and Disposition of Buyer Furnished Engines (including Exhibit "E") must be incorporated.

*not necessary
by mail
by wire*

6. Page 8 of the referenced letter, Article XII, DA Form 2400-8 must be incorporated.

*American Marc
will correct*

7. On Purchase Order Revision 1257-5 the changes made to DL 13214E0100, Rev. M dated 15 Mar 1969, are incomplete in that they are silent as to detail drawings 13214E0202 and 13214E0203 (See Exhibit "A" for detail).

*American
Marc will
accept.*

8. Written confirmation of our verbal agreement must be made regarding payment terms, i.e.

(a) Upon Government approval off from acceptance test, Generator Sets in lots of 150 each will be invoiced directly to American Marc, Inglewood, California, for payment at \$360.00 per unit. Payment in full is required within 30 days from date of invoice and should be forwarded to Teledyne Continental Motors, A Division of Teledyne Industries, Inc., P. O. Box 3960, Atlanta, Georgia 30302.

(b) For item 0017, Adjustment, Cleaning, Repairs and Parts Replacement to Government Furnished Engines and 0018, Packaging and Marking of Defective Government Furnished Engines, charges will be accumulated and invoices will be rendered on a regular basis. Payment in full will be required within 30 days from date of invoice and must be forwarded to the same Atlanta payment address as noted in the preceding paragraph.

(c) These payment terms are firm and deferred action in excess of 30 days could result in suspension of further shipments until payment is received.

In closing, since initial shipment is imminent, we trust you will give this matter your prompt attention and approval.

Sincerely,

TELEDYNE CONTINENTAL MOTORS
A Division of Teledyne Industries, Inc.

*W. A. Anderson
Am Marc agrees to
make the above changes
its P.O. # 11-1257 or
clarify by letter
which is specified.*

WAA/1h

W. A. Anderson
Contract Administration Chief

*Anderson
10/9/71
10/9/71*

A 25

TRIAL EXHIBIT 9--LETTER DATED OCTOBER 11, 1971 ANNEXED
TO AFFIDAVIT OF ROBERT R. MacDONNELL

AMERICAN

MARC

DIVISION EON CORPORATION

8331 SOUTH AVIATION BLVD., INGLEWOOD, CALIFORNIA 90301

AREA CODE 213 PHONE 678-7174

October 11, 1971

Mr. Homer Coleman
Teledyne Continental Motors
1000 Ryan Avenue
Walterboro, South Carolina 29488

Dear Homer:

SUBJECT: Method of payment to TCM on P.O. M-1257

In the Agreements and Purchase Order signed and dated 5-12-71 and in the letter of 5-13-71 signed by Mr. Rouse and replied to by Mr. Leonard 5-25-71 the method of payment agreed upon was resolved.

On 10-9-71, five months later TCM appears to be confused or is at this late date trying to make a different deal with American Marc.

For the record you and Harold will remember, we pointed out from our first meetings that American Marc had no money from which to pay TCM except when it received money from the Government as progress payments, after the shipment or sale of generators had been made, the invoice included in the request for progress payment and the government sending us a progress payment check for that specific billing.

In accordance with the above understanding, TCM asked in the May 13, 1971 letter to arrange with the Bank of America "to hold funds received from 1.5 KW generator sales, covered on EON P.O. No. M-1257 in a special account, which will be used to pay TCM invoices." On May 25, 1971, the writer sent you a copy of the arrangement set up at the Bank of America as requested. On 10-8-71 your "Financial Man from Muskegon" called and asked you to get that arrangement with the Bank of America into the P.O. On that date I called Mr. Walck at American Marc and P.O. 1257-9 was issued to cover this request. (Copy attached)

Mr. Homer Coleman
Page Two
October 11, 1971

On 10-9-71, Mr. Anderson handed me a letter dated 10-9-71 in which Paragraph 8 asked for written confirmation of his verbal agreement regarding invoicing procedures which we had discussed in our meeting in New York City, 9-1-71. Again for the record I told Mr. Anderson when he asked for "Progress Payments" for TCM in New York the same story as related to Messrs. Rouse and Coleman, "We can only pay you after we have been paid." He, I thought, understood this thoroughly since he then went into a song and dance about invoicing American Marc when the units were bought off in test as a lot and before final buy off, packaging and shipment.

In our meeting of 10-9-71, attended by you and Dick Campbell, I again agreed to the method of invoicing American Marc at the time of the lot test being accepted by the government QAR and stamped off. I did, however, again point out that this would get the invoice from TCM into the system earlier and would probably shorten the payment period by a few weeks.

However, again for the record I explained to all present that the sale, invoice, request for progress payment, payment by Government of Progress Payment, and then "skimming" of the money due TCM from that payment to TCM by the Bank of America, procedure would be followed by American Marc. Therefore, under Paragraph 8 (a) of the Anderson letter as I agreed to do at the meeting and signed the letter accordingly; we have changed the P.O. to reflect the Bank of America and payment arrangement by P.O. Change No. M 1257-9 dated 10-11-71. (Copy attached) I hope this letter clarifies the arrangement as far as invoicing is concerned.

Under Paragraph 8 (b), I have checked this request which incidentally was not discussed in New York and is a new subject, with Mr. Walck our Controller and he and I recommend that TCM on Item 0017 and 0018 invoice on a regular basis as Dick Campbell suggested (TCM accounting periods). American Marc will immediately upon receipt of invoice include the face amount in the next progress payment request. We will advise TCM and the Bank of American of the amount and the Invoice No. and the Progress Payment No. with advice to pay direct by cashier's check upon receipt of appropriate progress payment check from the Government. We will issue a P.O. change to include this if you want it in addition to this letter of clarification.

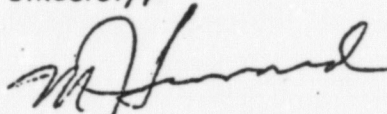
Mr. Homer Coleman
Page Three
October 11, 1971

Paragraph 8 (c) in accordance with all previous disclosures, agreements, and the facts of life is out of order in relation to this P.O. and contract except as implied in the original P.O. No. M 1257 where the Terms: block on the upper right hand corner indicates the normal business payment statement "Net 30 days."

As I pointed out to your Mr. Anderson, "an honest contract with an honest man or company" is worth 1000 unreasonable contracts with a disreputable concern.

We will pay you as we agreed and you have the largest bank in California acting as a monitor in your behalf, any other agreement or veiled threats are meaningless.

Sincerely,



M. J. Leonard
Vice President-General Manager

MJL:ir

Enclosures

cc: Mr. Harold Rouse

A 28

TRIAL EXHIBIT D--LETTER DATED SEPTEMBER 10, 1971 ANNEXED
TO AFFIDAVIT OF ROBERT R. MACDONNELL

* FILED IN
CONTINENTAL MOTORS

205 MARKET STREET
MUSKEGON, MICHIGAN 49443
(616) 724-2151 CABLE: CONTENT

September 10, 1971

American Marc Division
EON Corporation
8831 So. Aviation Blvd.
Inglewood, California 90301

Attention: Mr. M. J. Leonard

Dear Mr. Leonard:

Subject: Quotation for a total of 3,744 1.5 KW Generator Sets

We are pleased to submit the following quotation for a total of
3,744 1.5 KW generator sets:

<u>Quantity</u>	<u>FSN</u>	<u>Description</u>	<u>Unit Price</u>
1.872 (none set aside)	6115-889-1446	Generator Sets	\$ 334.50
1,872 (set aside portion)	6115-889-1446	Generator Sets	\$ 334.50

If First Article Test is not required the price can be reduced by \$3.00 per unit.

Included in the above price is \$3.50 per unit awarded for your consulting fee.

Delivery, packaging and quality assurance provisions will be as specified in
IFB # DSA-400-72-B-0311.

Payment: Net 30 days.

F.O.B. point: Our Walterboro, South Carolina plant.

9-10-71

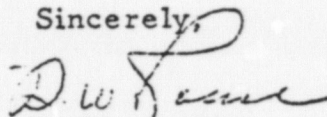
Mr. M. J. Leonard

Page No. 2
Sept. 10, 1971

Terms and conditions for a firm order will be similar to the provisions recently negotiated with you by our Mr. W. A. Anderson for your purchase order No. M1257.

We thank you for the opportunity to submit this quotation.

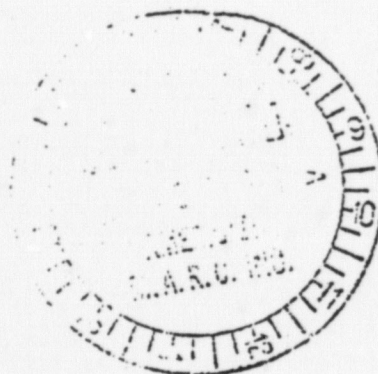
Sincerely,



H. W. Rouse

Vice President, Operations

/da



AFFIDAVIT OF SAUL WALLER IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
TELEDYNE INDUSTRIES, INC., :
Plaintiff, : 72 Civ. 3261
-against- :
EON CORPORATION, et al., : AFFIDAVIT
Defendants. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAUL WALLER, being duly sworn, deposes and says:

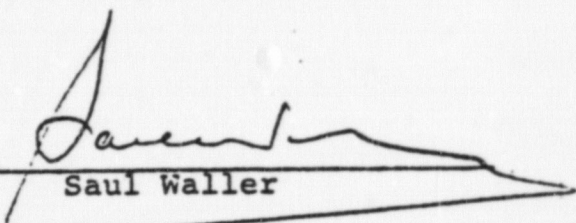
I am a defendant in the above-captioned action and I am also an officer and director of Eon Corporation. I submit this affidavit in support of defendants' motion pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure for a new trial on the grounds of newly discovered evidence.

On March 18, 19 and 20, pursuant to court order, I examined the books and records of Teledyne Corporation. The object of the search was to locate payments made by Teledyne to Eugene Wolper and M. James Leonard. In the course of my examination, I believe that I saw records of payments made by Teledyne, subsequent to May 12, 1971, to Technicon Associates. At the time Technicon Associates meant nothing to me and I made no record of my observations.

A 31
Affidavit of Saul Waller

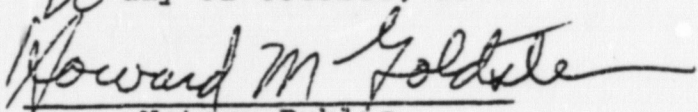
Very recently, in reviewing documents relating to defendants' appeal, I found evidence indicating that Technicon Associates is a company controlled by M. J. Leonard, formerly an officer and director of Eon Corporation. I also discovered that the Technicon Associates checks had been deposited in the Palos Verdes branch of the Bank of America, the same bank in which the alleged "special account" was set up by Mr. Leonard.

I respectfully submit that the payment I believe was made by plaintiff to Technicon Associates represents further evidence of the fact that Leonard was being paid by plaintiff to assure his cooperation in matters upon which he owed total allegiance to Eon Corporation.


Saul Waller

Sworn to before me this

20 day of October, 1975.


Notary Public

HOWARD M. GOLDSTEIN
Notary Public, State of New York
No. 60-6578525
Qualified in Westchester County
Commission Expires March 30, 1976

AFFIDAVIT OF SIDNEY FELDSHUH IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

TELEDYNE INDUSTRIES, INC.,	:	
	:	
Plaintiff,	:	
	:	72 Civ. 3261
-against-	:	(WK)
	:	
EON CORPORATION, et al.,	:	
	:	
Defendants.	:	<u>AFFIDAVIT</u>

-----X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

SIDNEY FELDSHUH, being duly sworn, deposes and says:

I am an attorney duly admitted to practice before the courts of this State and I am a partner in the firm of Feldshuh, Weinberger & Derfner, former counsel to the defendants in the above-captioned action. I submit this affidavit in support of the individual defendants' motion for a new trial.

Sometime in May, 1975, the defendants turned over to me a copy of Eugene Wolper's affidavit, a copy of which is annexed to the affidavit of Robert R. MacDonnell, Esq. This affidavit was not submitted to the court prior to this time for two reasons:

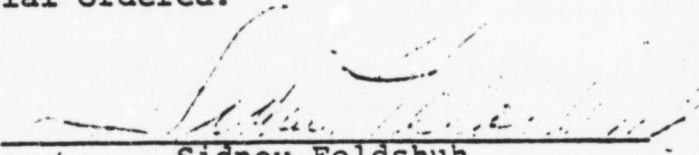
(a) I advised my clients that to bring this matter properly before the Court would require diligent preparatory work and in view of the significance of the evidence

Affidavit of Sidney Feldshuh

I did not feel that my responsibility as an officer of the Court would be fulfilled unless that work was completed.

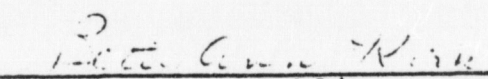
(b) I was unaware that there would be any time restrictions with respect to the submission of this affidavit in view of the fact that the submission of newly discovered evidence was covered by Rule 60 of the Federal Rules which contains an outside time limitation period of one year.

By reason of the foregoing, I respectfully submit that defendants' motion should be granted, the original judgment should be vacated and a new trial ordered.



Sidney Feldshuh

Sworn to before me this
26th day of October, 1975.



Notary Public

BETTY ANN KIRK
Notary Public, State of New York
No. 24-4504873
Qualified in Kings County
Commission Expires March 30, 1977

AFFIDAVIT OF HAROLD W. ROUSE IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

TELEDYNE INDUSTRIES, INC.,	:	
Plaintiff,	:	72 Civ. 3261 (W.K.)
-against-	:	AFFIDAVIT OF HAROLD W. ROUSE IN OPPOSITION TO
EON CORPORATION, ODIF PODELL, SIMON	:	<u>MOTION FOR NEW TRIAL</u>
SRYBNIK, NICHOLAS ANTON, SAUL WALLER	:	
and KERNS MANUFACTURING CORP.,	:	
Defendants.	:	

-----X

STATE OF MICHIGAN)
ss.:
COUNTY OF MUSKEGON)

HAROLD W. ROUSE, being duly sworn, deposes and says:

1. During the period of time relevant to this action I was the Vice President and General Manager of the General Products Division of Teledyne Continental Motors, a division of Teledyne Industries, Inc. I have reviewed defendants' recent motion for a new trial in this case, and in particular the supporting affidavits of Gene R. Walper (sworn to May 9, 1975) and Saul Waller (sworn to October 20, 1975). I am making this affidavit in opposition to defendants' motion.

The Walper Affidavit

2. Mr. Walper's affidavit contains the statement that he "talked with them [Mr. Coleman and myself] on Saturday."

ENTERED 208
10-31-75

In point and fact, and as I testified at trial, this conversation with Mr. Walper on the telephone was on Friday, not on Saturday. Teledyne's attorneys have informed me that I so testified at the trial (Tr 16).

3. In his fourth paragraph, Mr. Walper states that

"from the onset, Rouse had an inkling that Jim and I were sharing in the proceeds of the \$5. per unit of each generator. When Coleman and Leonard got into a heated discussion in negotiations and left the room, Rouse went into the other room with Jim and when they returned, the deal was pretty well made."

4. First of all, Mr. Walper does not state that either he or, in his presence, Mr. Leonard, disclosed to either me or Mr. Coleman that he intended to share his finder's fee with Mr. Leonard. In fact, no such statement was made to us, nor to my recollection was any statement made which would have allowed us to infer such an arrangement by implication.

5. In fact, Mr. Coleman and I were together at all times and the negotiations which were had on Monday and Tuesday were had between Mr. Leonard and myself, not between Mr. Leonard and Mr. Coleman. The only time there was a "heated discussion" was at the end of the first day when, as I earlier testified at trial, I -- and not Mr. Coleman -- insisted that Teledyne would not pay more than 75% for the tooling and inventory. Teledyne's attorneys have informed me that I testified similarly at trial (Tr 44, 55).

At this point, it was Mr. Leonard who left the room in anger, with Mr. Coleman and me then returning to our hotel.

6. In short, Mr. Walper's affidavit reveals many factual inaccuracies. However, in the few sentences relevant to this motion, Mr. Walper carefully refrains from giving any objective reasons why I supposedly "had an inkling", despite the fact that Mr. Walper's affidavit was apparently obtained ex parte by defendants.

7. I confirm that at no time -- until I read Walper's affidavit -- have I ever had any information concerning any sharing of Walper's finder's fee with Mr. Leonard.

The Waller Affidavit

8. Mr. Waller "believes" that he "saw records of payments made by Teledyne subsequent to May 12, 1971 to Technicon Associates." He further claims "to have found evidence indicating that Technicon Associates is a company controlled by M. J. Leonard." Neither at the time of the negotiations in point nor, to my recollection, at any other time prior to reading Mr. Waller's affidavit have I ever heard of "Technicon Associates". Nor was I ever aware that Teledyne was paying funds to any company (other than American Marc/Eon) in which Mr. Leonard had an interest or was a principal.

Affidavit of Harold W. Rouse

WHEREFORE, defendants' motion should be, in all respects, denied.

Harold W. Rouse
Harold W. Rouse

Sworn to before me this
1st day of October, 1975.

Erin H. Lieberman
Notary Public

Attest my hand and seal
this 1st day of October, 1975

AFFIDAVIT OF HOMER F. COLEMAN IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

TELEDYNE INDUSTRIES, INC.,	:	
Plaintiff,	:	72 Civ. 3261 (W.K.)
-against-	:	AFFIDAVIT OF HOMER F. COLEMAN IN OPPOSITION TO MOTION FOR NEW TRIAL
EON CORPORATION, ODIF PODELL, SIMON SRYBNIK, NICHOLAS ANTON, SAUL WALLER and KERNS MANUFACTURING CORP.,	:	
Defendants.	:	

-----x

STATE OF ALABAMA)
ss.:
COUNTY OF MOBILE)

HOMER F. COLEMAN, being duly sworn, deposes and says:

1. During the period of time relevant to this action I was the Plant Manager of the Walterboro, South Carolina facilities of Teledyne Industries, Inc. I have reviewed defendants' recent motion for a new trial in this case, and in particular the supporting affidavits of Gene R. Walper (sworn to May 9, 1975) and Saul Waller (sworn to October 20, 1975). I am making this affidavit in opposition to defendants' motion.

The Walper Affidavit

2. Mr. Walper's affidavit contains the statement that he "talked with them [Mr. Rouse and myself] on Saturday."

I never had spoken to Mr. Walper prior to meeting him for breakfast on Monday, May 10, 1971. The first time I ever heard Mr. Walper's name mentioned was in a telephone call from Mr. Rouse to me on Friday, May 7, 1971, when Mr. Rouse told me a Mr. Walper had called Teledyne that day. Teledyne's attorneys have informed me that I so testified at the trial (TR 302).

3. In his fourth paragraph, Mr. Walper states that

"from the onset, Rouse had an inkling that Jim and I were sharing in the proceeds of the \$5. per unit of each generator. When Coleman and Leonard got into a heated discussion in negotiations and left the room, Rouse went into the other room with Jim and when they returned, the deal was pretty well made."

4. First of all, Mr. Walper does not state that either he or, in his presence, Mr. Leonard, disclosed to either me or Mr. Rouse that he intended to share his finder's fee with Mr. Leonard. In fact, no such statement was made to us, nor to my recollection was any statement made which would have allowed us to infer such an arrangement by implication.

5. In fact, Mr. Rouse and I were together at all times and the negotiations which were had on Monday and Tuesday were had between Mr. Leonard and Mr. Rouse, not between Mr. Leonard and myself. My function at the meetings with Mr. Leonard was basically that of an observer. Teledyne's attorneys have informed me that I so testified at trial (Tr 351).

The only time there was a "heated discussion" was at the end of the first day when, as I earlier testified at trial, Mr. Rouse -- and not me -- insisted that Teledyne would not pay more than 75% for the tooling and inventory. Teledyne's attorneys have informed me that I testified similarly at trial (Tr 358). At this point, it was Mr. Leonard who left the room in anger, with Mr. Rouse and me then returning to our hotel.

6. In short, Mr. Walper's affidavit reveals many factual inaccuracies. However, in the few sentences relevant to this motion, Mr. Walper carefully refrains from giving any objective reasons why Mr. Rouse supposedly "had an inkling", despite the fact that Mr. Walper's affidavit was apparently obtained ex parte by defendants.

7. I confirm that at no time -- until I read Walper's affidavit -- have I ever had any information concerning any sharing of Walper's finder's fee with Mr. Leonard.

The Waller Affidavit

8. Mr. Waller "believes" that he "saw records of payments made by Teledyne subsequent to May 12, 1971 to Technicon Associates." He further claims "to have found evidence indicating that Technicon Associates is a company controlled by M. J. Leonard." Neither at the time of the negotiations in point nor, to my recollection, at any other time prior to reading Mr. Waller's affidavit have I ever heard of "Technicon Associates". Nor was I ever aware that Teledyne was paying funds to any company

Affidavit of Homer F. Coleman

(other than American Marc/Eon) in which Mr. Leonard had an interest or was a principal.

WHEREFORE, defendants' motion should be, in all respects, denied.

Homer F. Coleman
Homer F. Coleman

Sworn to before me this
day of October, 1975.

Constance J. McChilland
Notary Public

My Commission Expires Sept. 5, 1978

AFFIDAVIT OF THOMAS M. JUBB IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

TELEDYNE INDUSTRIES, INC.,	:	72 Civ. 3261 (W.K.)
Plaintiff,	:	
-against-	:	
EON CORPORATION, ODIF PODELL, SIMON	:	AFFIDAVIT OF THOMAS
SRYBNIK, NICHOLAS ANTON, SAUL WALLER	:	M. JUBB IN OPPOSI-
and KERNS MANUFACTURING CORP.,	:	TION TO MOTION FOR
	:	<u>NEW TRIAL</u>
Defendants.	:	

- - - - -x

STATE OF SOUTH CAROLINA)
 : ss.:
COUNTY OF COLLETON)

THOMAS M. JUBB, being duly sworn, deposes and says:

1. I am the controller of the Walterboro, South Carolina facilities ("Walterboro") of Teledyne Industries, Inc., plaintiff in this action. I make this affidavit in opposition to defendants' motion for a new trial on the basis of newly discovered evidence.

2. As controller of Walterboro, I have ultimate responsibility for all financial records prepared at Walterboro, and am the custodian of Walterboro's financial records.

3. On March 18, 19 and 20 of this year, I personally was present at and supervised an inspection of Walterboro's

financial records by Saul Waller ("Waller"). This examination, which was limited to Waller's inspection of documents relating to Walterboro's profit or loss on the manufacture of the 1.5 KW generator sets under the Subcontract with Eon, was ordered by this Court.

4. After Waller's review, I directed that all the documents inspected by Waller be kept physically segregated from Walterboro's other financial records in the event these documents had to be re-inspected.

5. I have read the Affidavits of Robert R. MacDonnell ("MacDonnell Aff.") and Saul Waller ("Waller Aff."), severally sworn to on October 20, 1975, submitted by defendants in support of this motion.

6. Initially, Waller states that the "object" of his search "was to locate payments made by Teledyne to Eugene Wolper [sic] and M. James Leonard." (Waller Aff., at 1). Such was not my understanding of the purpose of Waller's search. I had understood that this Court permitted defendants to send an accountant to Walterboro for the purpose of reviewing the back-up data which went into the documents I prepared for the trial of this action (Exs. 48-A, 54, 55, 56), so that defendants could challenge my conclusions that Teledyne had incurred a loss on the Subcontract. Teledyne's attorneys have informed me that my understanding is supported in the record (Tr 1839-43).

7. Waller further states that

"... I believe I saw records of payments made by Teledyne, subsequent to May 12, 1971, to Technicon Associates." (Waller Aff., at 1).

MacDonnell makes the statement

"... defendants also submit the affidavit of Saul Waller, one of the defendants herein, which indicates that based on his examination of plaintiff's books and records, he found a \$1,000 payment, made subsequent to May 12th, directly from plaintiff to a company controlled by Leonard." (MacDonnell Aff., at 10).

As this Court can readily observe, Waller's Affidavit nowhere mentions a "\$1,000 payment", nor does it state that he "found" records of any payments to Technicon Associates, merely that he "believes" he saw records, although he does not specify the type of records he "believes" he saw. These inconsistencies are nowhere explained.

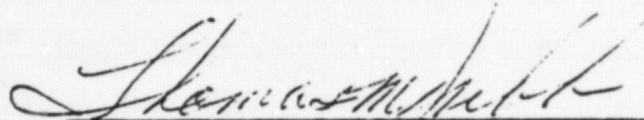
8. On October 22, 1975, I personally re-reviewed all those documents inspected by Waller still physically segregated at Walterboro -- other than the actual checks -- which could contain the name "Technicon" or the name "Technicon Associates" and the amount of any payment to Technicon or Technicon Associates. These documents reviewed by me were Check Registers for 1972 and 1973 and Voucher Registers for 1971 and 1972^{and 1973}. I repeat that these are the only documents -- other than the actual checks -- seen by Waller which could indicate the name "Technicon" or the name "Technicon Associates" and the amount of any payment.

Affidavit of Thomas M. Jubb

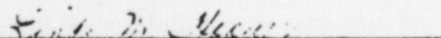
9. I did not review the actual checks for 1972 and 1973 because (1) the volume of the checks would require a review of several days, (2) Waller did not inspect each check and (3) no check is issued by Walterboro without recording the check in the Check Register and the transaction for which payment was owed in the Voucher Register. As there was no Check Register for 1971 available for Waller's inspection and inasmuch as Waller was not shown checks for 1971, the Voucher Register for 1971 is the only possible source of Waller's "belief" of a payment to Technicon Associates in 1971.

10. Nowhere in any of the documents I re-reviewed was there any mention of Technicon or Technicon Associates or of any payment to Technicon or Technicon Associates, nor have I ever heard of Technicon or Technicon Associates.

WHEREFORE, defendants' motion should be denied.


Thomas M. Jubb

Sworn to before me this
day of October, 1975


Notary Public

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission expires May 30, 1983

ADDITIONAL AFFIDAVIT OF ROBERT R. MacDONNELL
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

TELEDYNE INDUSTRIES, INC., : 72 Civ. 3261 (W.K.)

Plaintiff, :

-against- : ADDITIONAL AFFIDAVIT

EON CORPORATION, ODIF PODELL, :

SIMON SRYBNIK, NICHOLAS ANTON, :

SAUL WALLER and KERNS MANUFACTURING :

CORP., :

Defendants. :

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT R. MACDONNELL, being duly sworn, deposes and
says:

This affidavit is submitted as an addition to and
supplementing my prior affidavit made in support of the indi-
vidual defendants' motion for a new trial upon the ground of
newly discovered evidence, and in reply to plaintiff's affidavits
submitted in opposition to defendants' motion.

Defendants' original moving papers were premised upon
the fact that the entire transaction involved in this matter was
inundated by commercial fraud and bribery. In support thereof,
plaintiff submitted the affidavit of Eugene Wolper which indicated
that Eon Corporation's vice president had accepted a bribe from
the plaintiff.

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11-4-75 8108

In keeping with my responsibilities to the Court as an attorney, I personally met with James Leonard at my office last week. During my meeting, Mr. Leonard told me that on the first day of negotiations between he, Coleman and Rouse, Rouse offered him money to ensure his cooperation. Leonard further stated that he told Rouse not to pay him but rather to pay Wolper, leaving unanswered whether the arrangement also included that Wolper would pay him. This unanswered portion of Mr. Leonard's statement has, of course, been answered by Mr. Wolper.

When I asked Mr. Leonard to supply me with an affidavit to present to the court on defendants' instant application, he told me that he would speak with his lawyer in California and contact me the next day. I have not heard from Mr. Leonard since that time and can only assume that his lawyer advised him not to speak to me.

I wish to advise the court that in my opinion the statements which were made by Mr. Leonard were freely given. Prior to his admissions, I had fully advised him, to the best of my ability, as to the potential problems he would face if he recanted the testimony he previously gave in this action.

AS TO PLAINTIFF'S PAPERS

On Friday, October 31, 1975, at approximately 3 o'clock p.m., we were served with plaintiff's voluminous papers in opposition to defendants' motion for a new trial. Plaintiff's papers set forth no remarkable facts and, in effect, seek to avoid consideration of the problems raised by the fact that its

employees bribed defendants' representative to obtain his cooperation in executing the agreement sued upon.

Plaintiff argues that the trial record does not support defendants' position that a conspiracy existed to keep the special account secret, contending that Eon's Board of Directors had approved the account. Plaintiff's argument is misplaced. First of all, it is relying upon a trial record and the testimony of witnesses now implicated in the conspiracy. It is urged that the court should give little, if any, credence to the record. Moreover, plaintiff has misconstrued defendants' argument. A conspiracy to keep secret the special "trust" account was offered only as one possible explanation of the commercial bribery. Ignored by plaintiff is the fact that plaintiff anticipated additional profits of more than \$250,000 on the subcontract over and above the contract it had bid on directly to the government.

Moreover, it is submitted that a review of the trial record indicates that all the Board of Directors of Eon knew about the "special" account was that Leonard had agreed to pay Teledyne through an account that had been opened several years prior to the events herein. The Directors had no idea that Teledyne was to be treated different from other vendors who were paid from the old account. Certainly they were not copied to Leonard's letter of May 25th to the bank, nor were they copied to the correspondence between Rouse and Leonard. One might query why Rouse did not copy Anton to his May 13th letter to Leonard if he had, in fact,

discussed the "trust" account with Anton. All that Eon's Board knew was that Eon would pay Teledyne after it received the government advances. Any other conclusion is beyond the fair inference of the evidence. Again, however, we are faced with the testimony of co-conspirators who have, at a minimum, withheld information from the court sufficient to constitute a fraud upon this court and upon our entire system of justice.

Although it is apparent that plaintiff took painstaking care in preparing its papers in opposition to defendants' motion, it is not surprising to find that plaintiff has chosen to ignore the impact of defendants' Exhibit "O", the letter written by Rouse to Leonard subsequent to the subcontract offering Leonard a \$3.50 commission per unit if Leonard would give plaintiff the subcontract for Eon's second year procurement under its original government contract. It is submitted that this document, unresponded to, stands as conclusive evidence of the continuation of the conspiracy which was instituted at the inception of the original contract.

Plaintiff's arguments contained in Points 6 through 9 of its brief are not only irrelevant and immaterial but evidence the extremes to which plaintiff will go to cloud the issues. Faced with the possibility that fraud has been perpetrated on the court and a contract upon which it has obtained recovery is void ab initio, all plaintiff can argue is that the individual defendants are not parties to the contract and therefore have no right

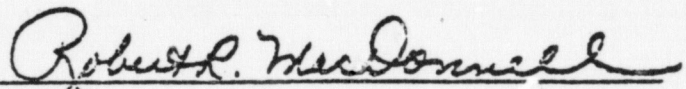
Additional Affidavit of Robert R. MacDonnell

to rescind. Of course, recission would run to the benefit of Eon. However, the simple fact is that the Directors have been held liable for something the corporation allegedly did. If there is no action against the corporation, and if there is no "trust" relationship, defendants cannot be held liable. Moreover, the individual defendants in this action clearly can not be held guilty of laches when they only recently learned of the fraud.

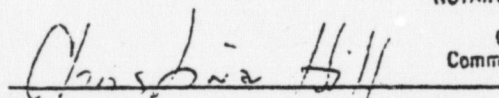
It is respectfully submitted that under the facts and circumstances herein, even assuming that the court denies defendants' application, plaintiff is not entitled to attorneys' fees for opposing the motion. This motion was brought on in absolute good faith, based upon new evidence which requires clarification and response. Defendants ought not be penalized for presenting material and necessary evidence to the court.

By reason of the foregoing, it is submitted that defendants' motion should be granted in all respects, or, at a minimum, that the court should order a hearing on the issues presented herein pending final determination of the motion. It is as much in the interest of the defendants as it is to the plaintiff to determine whether the subcontract between plaintiff and Eon Corporation was influenced by commercial bribery.

Sworn to before me this
4th day of November 1975.


Robert R. MacDonnell

CHRISTINA HILL
NOTARY PUBLIC, STATE OF NEW YORK
No. 03-4518581
Qualified in Essex County
Commission Expires March 30, 1976



MEMORANDUM AND ORDER OF KNAPP, D.J. #43327

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[U.S. DISTRICT COURT
Filed
Nov 3 1975
S. D. OF N.Y.]

----- x
TELEDYNE INDUSTRIES, INC., :

Plaintiff, :

-against- :

EON CORPORATION, et al., :

Defendants. :

MEMORANDUM AND ORDER

72 Civ. 3261

43327

----- x
KNAPP, D.J.

A variety of motions are before me. All are denied.

The motions are:

I. One by plaintiff to modify the judgment by increasing the amount awarded

II. Several by defendants to

(1) grant a new trial on grounds of newly discovered evidence

(2) modify the findings of fact with respect to the plaintiff's participation in Eon's Chapter XI bankruptcy proceedings

(3) reduce pre-judgment interest

(4) eliminate or reduce costs allowed to plaintiff.^{1/}

I.

The theory upon which plaintiff moves to increase the award of damages relates to the interpretation I placed on the instruments establishing the trust I found to exist. As Judge Bauman and I both observed, the instruments in question are replete with ambiguity. It now appears that my opinion suffered from the same defect.

It was my conclusion that the parties intended that as each payment was received from the government Teledyne's portion would be paid to it, and the balance would be available to Eon. This seems to me reasonable. At the time the agreement was negotiated plaintiff would have had no reason to suppose that an escrow account so limited would not have been adequate to protect its interest.^{2/} Moreover, being aware of Eon's desperate need for cash, it would have been unreasonable for plaintiff to assume that Eon would have been willing to tie up until the contract had been completed all cash received from the government.

Any findings of fact inconsistent with the foregoing are hereby amended to the extent necessary to make them consistent.

II(1)

The defendants' motion for a new trial on grounds of newly

discovered evidence rests primarily on a one-page affidavit by Gene R. Walper, the finder who introduced the plaintiff to Eon Corporation. In essence Mr. Walper states that he shared his finder's fee with Eon's agent Leonard, and that plaintiff's agent Rouse had an "inkling" of this nefarious arrangement.^{3/} It appears from the motion papers that Walper, having delivered this blockbuster, has declined any further communication with defendant. The motion is further supported by an affidavit of defendant Saul Waller - an Eon officer and director, and apparently an accountant - who had spent three days making a pre-trial examination of plaintiff's books and records under court order. He does not claim that anything was withheld from him at the time of his court-ordered examination. He just says that he has had some second thoughts he would like to explore.

The first difficulty with defendants' position is that there is absolutely no showing that the purported new evidence could not with due diligence have been discovered prior to trial. The attempt to make such a showing is embodied in the affidavit of Robert R. MacDonnell, an attorney associated with the firm that has been substituted for defendants' trial counsel. With commendable candor, Mr. MacDonnell makes clear that defendants' trial counsel could have obtained the evidence in question by the simple stratagem of pressing for the answer to a question plaintiff's attorneys had posed on Mr. Walper's examination before trial. However, while Mr. MacDonnell observes that - assuming defendants' present

version of the facts - it is not surprising that plaintiff did not pursue the inquiry at pre-trial, he offers no suggestion as to why defendants' counsel did not exploit the plainly indicated lead. I must therefore conclude that due diligence has not been shown.

Defendants' second difficulty is that the purported new evidence is cumulative, if not wholly inconsequential. In the course of absolving these defendants from complicity in Leonard's fraud, I clearly recognized that Leonard was in a position of conflict of interest with Eon, having been placed there by Eon's own act in offering him a bonus to unload the Army contract (see opinion, p. 20). I don't see how the picture would be much altered by positive proof that Leonard had decided to sweeten his bonus by dipping into Walper's finder's fee, or that plaintiff's agent Rouse had an "inkling" (or actual knowledge) of this wickedness.^{4/} It is hardly worth commenting on defendant Walper's desire to have a second look at the documents he has already spent three days examining.

II(2)

Defendants' motion for a modification of findings contains, among other things, a request that it be found that:

1. Teledyne, after filing its proof of claim dated

March 13, 1974, with the Bankruptcy Court, actively participated in the Bankruptcy proceedings as an unsecured general creditor and objected to the confirmation of Eon's proposed plan of arrangement by filing the objections attached hereto (Exhibit 2);

This request was complied with by the consent order entered on September 18, 1975, and is accordingly granted. The motion for modification is otherwise denied for the reasons stated at pages 7 to 11 of the original opinion and in the supplemental opinion of August 6, 1975.

II(3)

The motion for reduction of the judgment interest is denied because I believe that if this diversity case were being adjudicated in the Supreme Court of New York County that court would, as I have, apply California law with respect to pre-judgment interest.

II(4)

Defendants' request to be relieved of costs is based on the following contentions: Plaintiff was negligent in its original negotiations with Eon, which negligence was responsible for plaintiff's ultimate loss; the issues in this litigation

were complex and defended in good faith; plaintiff was not wholly successful, having failed to establish fraud against the individual defendants; the efforts to salvage Eon having failed, none of the defendants derived personal benefit from the conversion of trust assets.^{5/} Although I clearly have discretion to deny costs, such discretion should be exercised in conformity with general usage. Defendants have cited no instance where costs were withheld for such reasons, singly or in combination. My own research has uncovered no such instance.

In summary, all motions before me are denied, and any outstanding stay is vacated.

SO ORDERED.

Dated: New York, New York

October 31, 1975.

/s/

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/

With the exception of defendants' motion for a new trial, all of the motions were filed before defendants' notice of appeal, and as a result I retain jurisdiction to consider them.

2/

In view of these pending motions, there is some doubt as to whether the notice of appeal is premature. See generally 9 Moore's Federal Practice §203.11. If it is premature, then I have jurisdiction over the motion for a new trial as well; if it is not, then I have no authority to dispose of that motion, Weiss v. Hanna (2d Cir.1963) 312 F.2d 711. Accordingly, I am following the procedure approved by this Circuit in Ryan v. U.S. Lines (2d Cir.1962) 303 F.2d 430 in that I am indicating what my disposition of the motion would be if I clearly did have jurisdiction.

2/

The individual defendants not having been shown to be chargeable with Leonard's fraud, it is immaterial that such fraud may have induced in plaintiff the frame of mind that found a limited escrow to be acceptable.

3/

Walper's affidavit further states that plaintiff's agent knew "Jim [Leonard] was getting his share". In view of the preceding "inkling" language, I take this latter reference to "his share" to relate to the special bonus Leonard was receiving from Eon. In this connection, it is interesting to note that Walper's affidavit was apparently not in his own words, but was "dictated and prepared" in his "presence". Presumably, therefore, whoever "dictated and prepared" it went as far as possible to make the language favorable to defendants' position.

4/

Mr. MacDonnell's affidavit characterizes Walper's "Finder's" fee as "illegal" (p.4). As to that, I adhere to the ruling made at trial that there was nothing illegal in paying Walper a Finder's fee (see opinion, f.n 22 to p.20).

5/

It does not, of course, clearly appear whether or not the extension of Eon's pre-bankruptcy life by moneys received during the Teledyne contract may have benefited defendants in their capacity as Eon stockholders.

NOTICE OF MOTION FOR REHEARING AND REARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x JUDGE KNAPP
TELEDYNE INDUSTRIES, INC., : 72 Civ. 3261
Plaintiff, :
-against- :
EON CORPORATION, et al. : NOTICE OF MOTION
Defendants. :
----- x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Gene R. Walper, the memorandum submitted herewith, all of the pleadings and proceedings heretofore had herein, and upon defendants' prior motion for a new trial, the undersigned will move this Court at a Term for Motions thereof, at the Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, on the ^{5th} ~~first~~ day of December 1975, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard for an order pursuant to Rule 60(b)2 of the Federal Rules of Civil Procedure, vacating a judgment heretofore entered herein in favor of the plaintiff and against the individual defendants and ordering a new trial upon the ground that newly discovered evidence and the interest of justice require a new trial on the merits, or, in the alternative, for an order pursuant to Rule 9 of the General Rules of this Court granting defendants

ENTERED
11-21-75 EDB

Notice of Motion for Rehearing and Reargument

rehearing and reargument of the prior motion for a new trial,
and upon such rehearing and reargument granting defendants' motion
for a new trial in all respects, and for such other and further
relief as this Court may deem just and proper.

Dated: New York, New York
November 18, 1975

Yours, etc.

TRUBIN SILLCOCKS EDELMAN & KNAPP

By Robert L. MacDonnell
An Associate of the Firm

Attorneys for ~~Plaintiff~~ ^{DEFENDANT}
Office & P.O. Address
375 Park Avenue
New York, New York 10022

TO: C. MACNEIL MITCHELL, ESQ.
BREED, ABBOTT & MORGAN
One Chase Manhattan Plaza
New York, New York 10005

AFFIDAVIT OF GENE R. WALPER IN SUPPORT OF MOTION
FOR REHEARING AND REARGUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
TELEDYNE INDUSTRIES, INC., :
Plaintiff, :
-against- : AFFIDAVIT
EON CORPORATION, et al., :
Defendants. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GENE R. WALPER, being duly sworn, deposes and says:

I submit this affidavit in support of defendants' motion for a new trial and to clarify the meaning of my affidavit dated May 9, 1975, which was utilized by defendants' counsel on the prior motion for a new trial.

As the Court is aware, I acted as a finder for American Marc, a division of Eon Corporation ("Eon"), relating to an agreement whereby Eon subcontracted a portion of its contract with the United States Government to produce 1.5KW generator sets to Teledyne Industries, Inc. ("Teledyne").

During the first week of May, 1971, James Leonard, Vice President of Eon, had been contacting other firms who might be

interested in subcontracting Eon's government contract. On or about Friday, May 7th, he requested that I contact Teledyne, a former client of mine, to inquire whether they would be interested in the subcontract. Teledyne had previously bid on the same contract. I called my contact at Teledyne and was referred to the office of Harold Rouse. I called Mr. Rouse's office on Friday, May 7, and was advised that he was in Detroit on business. I left my home telephone number, briefly described the business nature of my call and requested that Mr. Rouse call me over the weekend if he was interested.

I received a call from Mr. Rouse at my home on Saturday, May 8, 1971 (I did not speak to him on Friday as he states). I described the type and number of units involved, told him that my fee was \$5 per unit, and told him further that I was representing American Marc. Rouse called me later in the day and advised me that Teledyne was interested and that he and Mr. Homer Coleman would come to Los Angeles on Sunday night. We arranged to meet for breakfast on Monday morning at the International Hotel and I told him that he would meet James Leonard, Vice President of American Marc. During this conversation, I also advised him that Mr. Leonard had his hand out and that Leonard would have to be taken care of if Teledyne wanted the subcontract. I understand that Rouse has testified that he did not know the name of the company offering the subcontract when he went to Los Angeles. This is simply not true.

We met for breakfast at 8:30 on Monday morning. During our conversation, Mr. Rouse indicated to me that Teledyne was very anxious to obtain the subcontract because they needed business in their Walterboro plant. Mr. Leonard arrived at approximately 9:00 and we drove to the American Marc plant.

At approximately 3:00 P.M. on Monday, May 10, Mr. Coleman and Mr. Leonard became involved in a heated discussion involving the charge per hour to be received by Teledyne for servicing the generator sets. Mr. Rouse excused Mr. Coleman and myself and thereafter conducted his negotiations in private with Mr. Leonard. By 5:00 P.M. of that day, Rouse and Leonard had made all the arrangements for the subcontract.

After this, Leonard told me that he would be sharing my finder's fee, a fact well known to Rouse. On Tuesday, May 11, Leonard pressured Rouse to get my commission agreement signed and at that point Rouse asked Leonard if he wanted his name on the agreement. Leonard said that my name was sufficient.

I have read Mr. Rouse's affidavit sworn to October 30, 1975, and particularly paragraph 7 thereof, in which Rouse states that until he read my May 9th affidavit he had no information concerning my sharing the finder's fee with Mr. Leonard. This statement is a blatant lie. Not only did he know in May, 1971, but he confirmed the fact to me in July, 1972, when Rouse had me fly out to Teledyne's principal offices to discuss Eon's default in payment under the contract.

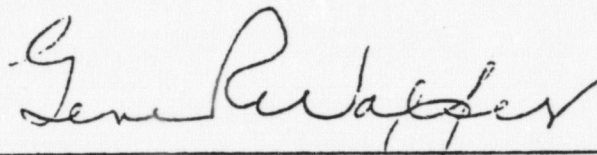
Rouse's knowledge is confirmed by the following: Under the terms of the written commission agreement, Defendants' Trial Exhibit A, I was to be paid approximately \$5400 within thirty days from the signing of the subcontract agreement. When I did not receive the payment by July, I called Rouse in Muskegon and requested payment. He told me that Leonard had also called him looking for the check. Although the check was to have been mailed directly to me at my offices at 750 East Green Street, Pasadena, California, Rouse forwarded the check, made payable to me, in care of Mr. Leonard at American Marc's office. I picked up the check from Mr. Leonard and he and I went to the bank together. I deposited the check and gave him \$2700 in cash, his one-half share. I made a second payment to Leonard in or about August, 1972 of an additional \$2,000 in the form of twenty \$100 bills.

At all times Rouse knew that Leonard and I were sharing the commission fee. I am convinced that the portion of my fee received by Leonard was part of a payoff by Rouse to Leonard. I support this statement by the fact that even though the agreement called for me to receive my commission after payment by Eon, my full commission was paid despite the fact that Teledyne was not paid in full for the generator sets it produced.

The Court should also note that the facts as I have set them forth in this affidavit were told by me to Teledyne's attorneys in Detroit during my meeting with Rouse in July, 1972 and

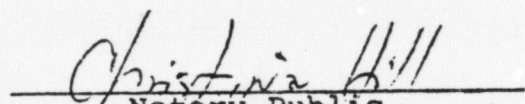
Affidavit of Gene R. Walper

also to Teledyne's attorneys in Los Angeles, Spencer Letts and Mr. Bank. It is surprising to me that no one has followed up on this before and that these facts have been withheld from the Court.



Gene R. Walper

Sworn to before me this
17th day of November, 1975.



Notary Public
CHRISTINA HILL
NOTARY PUBLIC, STATE OF NEW YORK
No. 03-4518581
Qualified in Bronx County
Commission Expires March 30, 1976

MEMORANDUM AND ORDER OF KNAPP, D.J. #43486

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
TELEDYNE INDUSTRIES, INC., :

Plaintiff, :

- against - :

EON CORPORATION, et al., :

Defendants. :

MEMORANDUM AND ORDER

72 Civ. 3261

#43486

-----x
KNAPP, D.J.

Decision in this case was rendered on July 10, 1975.

On October 21, 1975 - after defendant had filed a Notice of Appeal - substituted counsel for defendant made a motion for new trial on grounds of newly discovered evidence. That motion was denied by opinion dated October 31, 1975 on the ground, among others, that defendant had offered no suggestion of a showing why the supposedly new evidence had not been uncovered prior to trial. Shortly thereafter, defendant submitted an "Additional Affidavit" dated November 3, 1975. On November 12, 1975 defendant made the instant motion for reargument. Neither the "Additional Affidavit" nor the instant motion suggests any valid reason why the material tendered was not presented to the court (a) before the trial itself or (b) in time

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12-9-75

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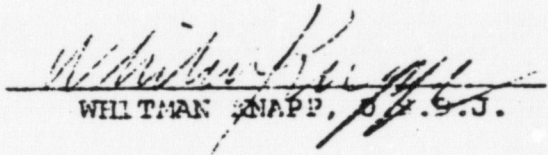
Memorandum and Order of Knapp, D.J. #43486

to have been considered upon the original motion. The instant motion is accordingly denied. However the "Additional Affidavit" and the affidavit offered in support of the instant motion are made part of the record.

SO ORDERED.

Dated: New York, New York

December 2, 1975.


WILMAN KNAPP, D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TELEDYNE INDUSTRIES, INC.,	:	
	:	
Plaintiff,	:	72 Civ. 3261
	:	
-against-	:	(W.K.)
	:	
EON CORPORATION, ODIF PODELL,	:	
SIMON SRYBNIK, NICHOLAS ANTON,	:	<u>NOTICE OF APPEAL</u>
SAUL WALLER and KERNS MANUFACTURING	:	
CORP.,	:	
	:	
Defendants.	:	
	:	

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S I R S:

PLEASE TAKE NOTICE that the defendants Odif Podell, Simon Srybnik, Nicholas Anton and Saul Waller hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum and order of this Court denying defendants' motion for a new trial on the grounds of newly discovered evidence and for other relief and each and every part thereof, filed in this action on November 3, 1975.

Dated: New York, N.Y.
December 2, 1975

Your, etc.

TRUBIN SILLCOCKS EDELMAN & KNAPP

By Robert S. Waulhaw
A Member of the Firm

Attorneys for Defendants
375 Park Avenue
New York, N.Y. 10022

TO: BREED, ABBOTT & MORGAN
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, N.Y. 10005

ENTERED
12-2-75



Due and timely service of **ONE** copies
of the within **APPENDIX** is hereby
admitted this **26th** day of **OCTOBER** 1976

Bruce A. Holtzman
.....
Attorneys for **APPELLANT**